

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON KEITH BRIDGES,

Defendant-Appellant.

UNPUBLISHED

May 24, 2012

No. 301911

Wayne Circuit Court

LC No. 10-006423-FH

Before: SERVITTO, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to two years' probation for the felon in possession conviction, and five years' imprisonment for the felony-firearm conviction. Because there was sufficient evidence to support defendant's convictions, his convictions were not against the great weight of the evidence, and defendant was not denied the effective assistance of counsel, we affirm.

On May 13, 2010, Detroit police officers received a report of several people in the street creating a disturbance. It was reported that one of the individuals, a man in a light-colored jogging suit, was armed. As officers Randall Craig and Ivan Belew arrived in the area of the disturbance, they saw defendant and two others, Deandre Cody and Charles Ford, walking down the sidewalk. Defendant was wearing a light-colored jogging suit. Officer Craig saw defendant look over his shoulder and toss a dark object into a lawn, then continue walking. The officers stopped the three men and while none of the men had any weapons on their person, Officer Belew recovered a firearm from the lawn where Officer Craig had seen defendant throw an object. Because defendant had previously been convicted of a specified felony and was ineligible to possess a firearm, he was arrested and charged with felon in possession and felony firearm.

On appeal, defendant first argues that there was insufficient evidence to convict him of the charged offenses. We disagree.

Sufficiency of the evidence questions are reviewed de novo, in a light most favorable to the prosecution. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). This Court determines whether a rational trier of fact could find that the evidence proved the essential

elements of the crime beyond a reasonable doubt. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Circumstantial evidence and reasonable inferences may be used to prove the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

“[A] person convicted of a specified felony is prohibited from possessing a firearm until five years after he has paid all fines, served all terms of imprisonment, and completed all terms of probation or parole imposed for the offense.” *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004), citing MCL 750.224f(2)(a). A person who violates MCL 750.224f “is guilty of a felony, punishable by imprisonment for not more than 5 years, or a fine of not more than \$5,000.00, or both.” MCL 750.224f(3).

The elements of felony-firearm are: (1) defendant possessed a firearm and; (2) defendant possessed the firearm during the commission of a felony or an attempted felony. *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011). “Possession of a firearm can be actual or constructive, joint or exclusive.” *Id.* See also *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Possession can be shown by direct or circumstantial evidence. *Johnson*, 293 Mich App at 83.

There was sufficient evidence to convict defendant of both charges in this matter. With respect to the felon in possession charge, the parties first stipulated that defendant had committed a previous specified felony, and on the date of the incident, defendant did not have the right to possess a weapon. Second, there was sufficient evidence that defendant possessed a weapon. Officer Randall Craig testified that there was “no question” that he saw defendant toss a large black object in the yard, on the night of the incident. Defendant was visually distinguishable from his two companions the night of the incident, as they were both wearing dark clothes, whereas defendant was wearing a light gray jogging suit, and defendant was taller than the other two men. According to Officer Craig, defendant was the nearest of the three men to the house and yard.

Officer Ivan Belew testified that he searched the area where Officer Craig saw defendant toss the object and discovered a handgun. Officer Belew testified that he did not see any other people or objects in the area that he searched. According to Officer Craig and Officer Belew, there was adequate lighting for Officer Craig to positively identify defendant. The officers’ testimony presented sufficient evidence for a jury to find that defendant possessed the weapon found on the lawn.

As indicated by defendant, one of defendant’s companions that night, Deandre Cody, testified that he was the one who threw the gun, and there was also testimony that defendant corroborated this version of events to an investigator as well as the fact that defendant was unaware of a gun until just as the police arrived. However, the jury determines questions of fact, and assesses the credibility of witnesses, *People v Cameron*, 291 Mich App 599, 616; 806 NW2d 371 (2011), and was thus free to disbelieve these statements. This Court will not interfere with the jury’s role of determining the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Therefore, defendant’s argument that there was evidence that he did not possess the gun is irrelevant to this appeal.

Similarly, there is sufficient evidence of the elements of felony-firearm. First, the underlying felony for defendant's felony-firearm conviction was felon in possession. Second, there was sufficient evidence that defendant possessed the gun while he was committing the felon in possession felony. See *supra*.

Second, defendant argues that the verdicts were against the great weight of the evidence. Again, we disagree.

A "new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). However, because defendant failed to preserve this issue by raising it in a motion for a new trial before the trial court, we review for plain error affecting defendant's substantial rights. *Cameron*, 291 Mich App at 618.

Defendant argues that the jury rendered inconsistent verdicts when it convicted defendant of felon in possession and felony-firearm, but acquitted defendant of the concealed weapon charge and that such verdicts indicate that the convictions were against the great weight of the evidence. However, the concealed weapons charge requires that the prosecution prove, beyond a reasonable doubt, that defendant not only *possessed* the gun, but also, that he *concealed* it. See *People v Parker*, 288 Mich App 500, 507; 795 NW2d 596 (2010); *People v Reynolds*, 38 Mich App 159, 161; 195 NW2d 870 (1972) ("Concealment is an essential element of the crime of carrying a concealed weapon"). Therefore, instead of the jury verdicts being inconsistent, it is a more logical conclusion that the prosecution did not prove that defendant concealed the gun. In fact, Officer Craig testified that he could not see how, where or if defendant pulled the gun out of his clothing. His credibility does not come into play on this issue because it was entirely possible, and reasonable to believe, that Officer Craig observed defendant toss the gun into the yard, without defendant's concealing it beforehand. The verdicts do not suggest any plain error affecting defendant's substantial rights.

Finally, defendant argues his trial counsel was ineffective because trial counsel stipulated to a jury instruction with an overly broad definition of the word possession. We disagree.

Ineffective assistance of counsel claims are mixed questions of law and fact. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). This Court reviews a trial court's findings of fact, if any, for clear error, and reviews the ultimate constitutional issue arising from the ineffective assistance of counsel claim de novo. *Id.*

To prove a claim of ineffective assistance of counsel, a defendant must establish (1) that counsel's performance fell below objective standards of reasonableness, (2) but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different, *Swain*, 288 Mich App at 643. Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *Id.*

Defense counsel's stipulation to the jury instruction was error. "[C]onstructive possession of a firearm for use in connection with a felony is not analogous to constructive possession of drugs." *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995), rev'd

on other grounds *Burgenmeyer*, 461 Mich 431. The jury instruction that the trial judge read to the jury is specific to controlled substance offenses. See CJI2d 12.7. The jury instruction the trial court read to the jury describes constructive possession as:

[T]he person had a right to control the thing, even though it is in a different room, or place. . . . It is not enough if the defendant merely knew about the gun. The defendant possessed the gun only if he had control of it, or the right to control it, either alone or together with someone else.

Case law states that constructive possession of a firearm exists when “the location of the weapon is known and it is reasonably accessible to the defendant.” *Johnson*, 293 Mich App at 83; *People v Hill*, 433 Mich 464, 471; 446 NW2d 140 (1989). Therefore, constructive possession has a broader scope in the controlled substances context, and it was error for defense counsel to stipulate to the instruction.

Although error, defense counsel’s failure to object to the jury instruction does not fall below an objectively reasonable standard. The terms in the two standards are slightly different; however, the instruction conveyed the meaning of constructive possession to the jury. The difference between controlled substance constructive possession and firearm constructive possession is essentially distance from the contraband. Firearm constructive possession requires the possessor to be in a place where the firearm is reasonably accessible to the defendant. *Johnson*, 293 Mich App at 83. On the other hand, a person can be in constructive possession of a controlled substance even if he is not in the same room as the contraband. *Burgenmeyer*, 461 Mich at 439; CJI2d 12.7. In this case, defendant was not far away from the gun when it was found. Therefore, the distinction between the two standards is less important. The jury would not have been confused or misled by the instruction that defendant could be in a different room or place from the gun, given the circumstances of the case before it.

In any event, defense counsel’s stipulation to the jury instruction was not outcome-determinative error. On the facts of this case, the jury could easily have concluded that defendant had actual possession of the weapon. Officer Craig testified that he saw defendant toss an object, and Officer Belew found a handgun in the area where defendant allegedly tossed the object. Officer Craig confidently identified defendant as the individual who threw the object. Cody testified that he had the gun, and that defendant did not know he had the gun. However, given defendant’s conviction, it is a certainty that the jury did not believe Cody’s version of events. The jury would have convicted defendant based on actual possession, even if defense counsel had insisted on the proper definition of constructive possession of a firearm. Therefore, defense counsel was not ineffective.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Karen Fort Hood